

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1420

UNITED STATES OF AMERICA,
Appellee,

-vs.-

NICHOLAS RIZZI,
Appellant.

SUPPLEMENTAL BRIEF IN BEHALF OF
APPELLANT NICHOLAS RIZZI

Preliminary Statement

After the briefs of both the defendant and the government were filed in this Court, prior assigned counsel for the defendant was relieved by this Court, and present appellate counsel was assigned, under the Criminal Justice Act, and was authorized to file a further brief, if he deemed it appropriate. This brief is filed

pursuant to that authorization.

With respect to Point I, this brief is a reply to the government's brief. The remaining points of this brief supplement the one point raised in the appellant's brief.*

POINT I

THE TRIAL EVIDENCE FAILED TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT. SPECIFICALLY, THE GOVERNMENT'S PROOF DID NOT SHOW THAT RIZZI POSSESSED THE NECESSARY KNOWLEDGE, INTENT AND PARTICIPATION IN
THE FRAUDULENT SCHEME.

A. Introduction and Applicable Legal Principles.

At the trial, the government was given virtually free rein, without objection, in its presentation of evidence. Of the 2,261 Medicaid patients treated at the Second Avenue Clinic, and the uncalculated number of private patients treated there (Tr. 713), the government chose to present specific evidence only with respect to four patients. This focus upon four patients created the distorted impression that an administrator who was thoroughly immersed in the legitimate aspects of his function would similarly be aware of and view, in a magnified state, the details relating to the treatment of individual patients.

* References herein to the government's brief are preceded by "G.B."; references to the joint appendix are preceded by "A."; references to the trial transcript are preceded by "Tr.".

Independent of the facts of this case, the entire drug addict scene is distasteful to the average citizen. Physicians fees and "Medicaid Mills", no matter how legal, are likely to arouse the passions and resentments of a juror, particularly when it is driven home to him that his tax dollars are being used to pay for them. Against this background, and particularly in view of the huge amount of evidence received at trial with respect to matters not shown to be within Rizzi's knowledge, it is not surprising that the jury returned a guilty verdict against the only available target. Dr. Sicolick was a fugitive and the government chose not to prosecute the other five physicians actually involved in the double billing scheme.

Throughout its brief, in a conclusory fashion, without relating the law to the actual facts of the case, the government cites numerous authorities. None of these was shown to be analogous to the facts of this case.

* * *

In Scott v. United States, 263 F. 2d 398 (5th Cir., 1959), the Court perceptively declared:

"Verdicts in closely contested criminal cases often find their real spring in the atmosphere generated in and by the trial where things felt but unseen, sometimes real, sometimes illusory, arising out of, but more than, the relevant and admissible evidence, in the end more influence the verdict than does the relevant testimony itself."

The following oft-cited excerpt from the concur-

ring opinion in Krulewitch v. United States, 336 U.S.

440 (1949), is quite applicable:

***As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that the conspiracy existed.

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits." (336 U.S. at 353-4).

In United States v. Kates, 508 F. 2d 208 (3rd Cir., 1975), the Court held:

***It is well established that the 'gist' of a conspiracy is an agreement. However slight or circumstantial the evidence may be, it must, in order to be sufficient to warrant affirmance, tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged conspirators. Similarly, we have stated that the essence of the conspiracy is a 'unity of purpose' or 'common design'. We must also find in this case that [the appellant] knowingly entered into the conspiracy and that he had the specific intent to defraud.... As the Court of Appeals for the Ninth Circuit stated in reversing a conspiracy conviction under this same statute, 'We must be ever mindful that the requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings.' United States v. Piepgrass, 425 F. 2d 194, 199 (9th Cir., 1970)." (508 F. 2d at 310-311).

The United States Court of Appeals for the Sixth Circuit has stated the same principle in a different way:

"Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond a reasonable doubt of the particular offense against the Federal criminal law with which the defendant had been charged." United States v. Sworthout, 420 F. 2d 831, 831 (6th Cir., 1970).

* * *

In fact, the government's proof fell far short from establishing the requisite knowledge, intent and activity on the part of Rizzi. The government's brief, however, by a skillful manipulation of the facts, seeks to persuade this Court that the essential elements of the crimes charged were established at trial. In short, the government's brief does not reflect the trial evidence with respect to Rizzi's actual involvement. We shall now demonstrate the basis for our contention.

B. Rizzi's Background and "Experience".

In 1971, Rizzi was a twenty-three year old former narcotic addict who had enrolled in Dr. Sacolick's private methadone program for the purpose of seeking rehabilitation. (G.B., at p. 4; Transcript of Sentence at Tr. 926; Tr. 325, 398, 504, 507).

Dr. Sacolick appears to have been a highly resourceful and ingenious individual. Aside from being a physician, he spoke many languages, was an engineer, an airplane pilot and teacher, and a computer programmer (Tr. 502). He

maintained three apartments, one which he shared with his wife, another with his mistress, who was a patient, and a third for those times when he wished solitude (Tr. 502). Aside from running a normal medical practice during the day, he operated a private methadone program from 5:00 PM to 7:00 PM, a sex therapy clinic from 7:00 PM to 10:00 PM (Tr. 505).

It is not unusual in drug treatment programs for patients to become actively involved in assisting in the rehabilitation of other patients. That pattern existed in Sacolick's private, pre-Medicaid program. Thus, as testified by government witness Yurasits, he, Rizzi and others became involved in Sacolick's program on a volunteer basis. Volunteers were eventually paid \$1.00 an hour which was applied toward their treatment fee, and as Sacolick's methadone program grew, Rizzi and Yurasits were assigned a larger number of administrative tasks, and their remuneration increased, although Sacolick was in charge on a day to day basis. (Tr. 533-540).

In its brief, the government claims that, during the period in question, Rizzi "held himself out to be not only an expert in health delivery services, but a partner and confidante of Sacolick..." (G.B., at p. 20). In fact, the evidence shows that Rizzi was nothing more than a former "junkie" who was used by Sacolick to perform ministerial tasks connected with the legitimate aspects of the

methadone maintenance program, and to recruit potential patients (See: Tr. 507-8).

In short, this young man was taken over by a high powered physician and jack-of-all-trades, who fled the country shortly before the indictment herein, and who reserved to himself the control of all aspects of the program which are now alleged to have been fraudulent.

Rizzi obviously performed his legitimate administrative tasks well, and, eventually, he was well compensated in return. He had enough business sense to form a corporation, and he processed as many as six hundred patients a day. The record is devoid of any evidence that, within the area governed by Rizzi's responsibility, the patients in question received anything less than that to which they were entitled.

C. The Legitimacy of the Basic Program.

Each of the four patients whose files were examined in this case were, in fact, eligible for Medicaid in a methadone program (Tr. 36; 148-9). Aside from physicians, who reported only to Sacolick, the clinic was staffed by social workers, secretarial personnel, nurses, security guards and various other types of assistants (Tr. 229, 244, 393, 576).

The government's brief (G.B. at p. 4), would have it appear that Medicaid was paying the clinic \$4.00 per patient per day, solely for the dispensation of \$.06 worth

of methadone and the rendering of "primary medical care" on those occasions that such care was necessary. One would get the impression, from the government's brief, that the operation was a simple one. To the contrary, it was Rizzi's job to coordinate the flow of patients and the operations of non-medical personnel, amidst a "hectic, noisy and chaotic" atmosphere of the type one might imagine where up to six hundred persons with drug addiction problems were drifting in each day (Tr. 244). His function was that of a coordinator, whose activities included seeing to it that the patients, inter alia, received group and individual counseling at the clinic (Tr. 244).

It must be realized that, when the clinic opened, in 1972, there were only five or six such clinics, and that number grew to twenty-two or twenty-three in 1975 (Tr. 645-6). In effect, Rizzi was placed in the position of charting a previously unplotted administrative course, in an area where such auxiliary support services had not been rendered by existing municipal programs (Tr. 602-603).

With respect to the billings of the \$4.00 basic charge, Rizzi's function was purely ministerial. Sacolick had devised a computerized schedule for each patient, both with respect to methadone dosages, billing check-off, etc. (Tr. 511). The financial aspects of the program, to the extent that those aspects were dealt with by Rizzi, were self-effectuating, since a nurse would merely check off attendance on the computerized sheet (Tr. 511), which would

be forwarded to the bookkeeping personnel at Sacolick's Park Avenue office, and who were under the exclusive control of Sacolick. (Tr. 472-493).*

During the first year of operation, Sacolick was thoroughly immersed in the operation of the Second Avenue Clinic, and developed the patterns of administration (Tr. 587-589). As we shall show, infra, he retained the same control over the actual delivery of medical services and billings, throughout the entire period of Rizzi's association with the clinic.

D. The Billing for Specialized Services.

The essence of this indictment is that, under the \$4.00 Medicaid contract, and aside from the other services rendered to the patients, Sacolick was obliged to render "primary medical care" to the patients, without additional charge. The regulation in question (See: GX 35) provided that:

"The physician agrees to assume responsibility for the patient's total medical care." (Tr. 136).

* * *

"Medicaid will not reimburse the principal investigator or other physicians on the staff of the maintenance facility for office visits required to deliver medical care which would normally be within the

* See also: Tr. 547-549.

competence of a general practitioner.
It is expected that such care will be given during the patient's routine methadone maintenance visits, which are already reimbursed. When care by a specialist is necessary, the specialist may bill, and will be reimbursed for his services in accord with the Medicaid fee schedule." (Tr. 137).

It can thus be seen that "the physician" (Sacolick and his physician staff) was required to provide basic medical care and to see that specialized medical care was made available to the patient, if necessary.

There was no definition available to a layman with respect to the division between basic and specialized medical care (Tr. 147). Presumably, a trained physician would know the difference, but that was a "medical decision" (Tr. 147, 165, 281, 708). Moreover, there was no prohibition against the examining doctor rendering and billing for the specialized medical care, if such was necessary (Tr. 139).

By no reasonable stretch of the imagination could a lay administrator be held responsible for the decision making process or an evaluation of that process. In this case, the record is absolutely devoid of any evidence that Rizzi actually knew or had reason to believe that the physicians were abusing the system by charging for basic medical care.*

* Indeed, since it was not in his domain, Rizzi cannot be held chargeable with knowledge of the regulation, and the evidence did not demonstrate that he had actual

[Footnote continued on following page]

Assuming, arguendo, that Rizzi knew and understood the regulation, it is clear that he, as a layman, was not in a position to pass judgment upon the medical decisions of well qualified physicians. All of the physicians in this case were enrolled in Medicaid prior to their knowledge of or involvement in Sacolick's operation (Tr. 211, 261, 289, 332). Each had impressive credentials in various areas of specialization (Tr. 207-208, 260-261, 288-289, 330-332), and each had exclusively discussed their medical responsibilities in the clinic with Dr. Sacolick and in the absence of Rizzi. (Tr. 211-218, 249-251, 254, 263, 326, 332-3, 337-40).

Each physician testified that there was never a time that Rizzi made or became involved in or discussed medical decisions (Tr. 252, 274, 315, 381).

It will be recalled that the government focused its

[Footnote continued from prior page]

knowledge. The bulletins and fee schedules were distributed to physicians (Tr. 35-36, 97-101, 371). Government witness Yurasits claimed to have once seen a copy of the regulations, without absorbing their content. When asked where he saw the regulations, he responded "It might have been on Mr. Rizzi's desk." (Tr. 586). That testimony hardly establishes that it was on Rizzi's desk, or how long it was there, or whether Rizzi ever read it. There is not one word of testimony in this record that Rizzi ever discussed the regulation with anyone or, more specifically, that he ever had occasion to discuss the difference between basic and specialized medical care with anyone.

attention upon four of the clinic's patients. It is instructive to examine the diagnoses which the physicians made with respect to those patients. In order to credit the government's claim that Rizzi knew that the patients were actually being treated for basic ailments, not requiring the services of a specialist, one would have to conclude, beyond a reasonable doubt, that Rizzi understood the diagnoses which appeared upon the Medicaid billings, pursuant to the handwritten notes of the examining physicians. These include the following: osteoarthritis of lumbosacral spine, dermatitis sicca, bradycardia, Wolf-Parkinson-White syndrome, atonic colon, leukorrhea, bronchial asthma, seborheic dermatitis, URI (urinary tract infection), hypercalcemia, sinus tachycardia, peripheral vascular disease, glossitis, diaphoresis, vascular headaches, bursitis, exogenous obesity, vaginitis, avitaminosis, furunculosis, pulmonary emphysema, corpulmonale, rheumatoid spondylitis, myocarditis, etc. (Tr. 695-707).

The testimony was that the majority of these diagnoses related to "minor problems" dressed up in fancy medical terminology. However, there is no evidence that anyone ever indicated this to Rizzi, or that he had the specialized knowledge necessary to independently understand the diagnoses. Indeed, even with a knowledge of the terminology, according to the government's expert, "there is a sizeable number of diagnoses which, just looking at the

bill you can't tell whether it is minor or not. Many diseases obviously could be mild or the same diseases could be severe." (Tr. 707). In short, it was a "medical decision" (Tr. 708).

The essence of the matter was captured in the following exchange between the Court and the government's expert witness:

"If you took away all the strange words, there wouldn't be much mystery to medicine, would there?

"THE WITNESS: Or much income." (Tr. 709). *

The government argues that: "... by his position in the program, Rizzi had the opportunity, need and every reason to know that Medicaid was being double-billed improperly for thousands of dollars worth of minor medical care services..." (G.B. at p. 21). In fact, nothing in the record supports that contention.

Attempting to circumstantially establish their point, the government argues: "Rizzi, himself, a former methadone patient in Sacolick's private program, had personal knowledge both of the minor nature of the ailments the program doctors were treating, and of the fact that the \$20.00 weekly fee he had paid to Sacolick covered methadone and routine care." (G.B., at pp. 21-2). The

* Significantly, each of the clinic's physicians, except Sacolick, testified as a government witness, and none has been prosecuted. Since all were registered with Medicaid, all received the regulations, but all denied that they knew about the Medicaid billing restrictions set forth in the regulations (e.g., 327-8, 371).

argument is absurd. How was Rizzi to know that the ailments described, supra, were routine? There is not even any proof that Rizzi actually read the diagnoses. Indeed, the testimony of Dr. Robert Newman, a government expert, made clear that the methadone treatment, itself, could effect respiratory depression, that addicts frequently had persistent liver disorders, had a tendency to go back to illicit drugs, and that it was not unusual for them to mix their intake with tranquilizers and alcohol (Tr. 113-119). While the government sought to minimize the medical problems of addicts, such generalizations can certainly not be binding upon Rizzi. See also: entry for Methadone Hydrochloride in Physician's Desk Reference (1973, Medical Economics Company), at p. 878.

The government also seeks to make much of the fact that one of the later advertisements for a Medicaid physician had Rizzi's name on it as the person to call (G.B., at p. 14). In fact, as shown by the testimony of each of the physicians, no physicians ever had an employment or medical discussion with Rizzi. Moreover, no physician who answered the advertisement in question testified at the instant trial.

E. Rizzi Did Not Share in the Specialty Fees or the Park Avenue Diagnostic Examination Fees.

The government's brief seeks to convey to this Court the impression that Rizzi was some kind of a full partner with Sacolick with respect to all fees generated by the double billing aspect of the program. In fact,

all such fees were deposited in Sacolick's professional corporation account, and Rizzi only received a percentage of the legitimate \$4.00 billing. The only alleged deviation in this regard related to a check written by Sacolick to Rizzi's corporation on April 12, 1974, on the stub of which Sacolick wrote "through 2/28/74 less \$1,057.50 reserve re: Kamen pending." (GX 430), and another check, dated May 10, 1974, on the stub of which Sacolick wrote "balance on account through 2/28/74". Aside from those two memoranda, which the government argues established that Rizzi received a percentage of that one Medicaid payment for specialized services, there is no other such evidence in the case. Even as to these entries, they were made by Sacolick, and it is not known whether they were made before or after they were sent to Rizzi, and it is not known what, in fact, was the rationale of the payment. (See Point II, infra).

By the government's own admission (G.B., at p. 13), the period of time in which these notations were made, was one of decreased revenues, due to competition and changes in the Medicaid pre-payment schedule, and there is no reason to believe that the entry was anything other than means by which Sacolick was monitoring his own cash flow. The percentage involved, if the government is correct, would have been 30% of the gross of Kamen's Medicaid check (See: G.B., at p. 16, fn.). In fact, there is no claim anywhere that Rizzi and Sacolick had an agreement that

Rizzi would receive 30% of the gross.

Assuming, arguendo, that Rizzi received, for any reason, 30% of the aforesaid payment, there is still no evidence that he had reason to believe that any such payments were violative of the regulations, or were not rendered for bona fide specialized services.

F. The Park Avenue Examinations.

The government argues that "Rizzi was responsible for selecting patients for the trip to the Park Avenue office each week and to send more patients if the assigned quota failed to show." (G.B., at p. 11). Although the government would like to believe this, it is contradicted by the testimony of its own witness, Yurasits. The scheduling of the Park Avenue examinations was built into the computer program, and the personnel at the Second Avenue office merely sent patients for their Park Avenue examinations pursuant to the policy established by Sacolick and implemented in his own computer devised schedule (Tr. 574; see also: Tr. 229, 233-4, 271, 290-3, 481, 515, 572-6).

G. Kamen's Reaction to the Amount of a Medicaid Check.

The Medicaid checks payable to Kamen for the specialized services that he claimed were either sent up by Sacolick from Park Avenue or mailed to the Second Avenue office. Rizzi would then present the check to him for endorsement. On direct examination, Kamen testified as follows:

"Well, at first they were brought into me face up. And when I saw a figure there I said 'wow,' and after that they usually brought them in reverse side up, back side up, and said, 'Don't look at the check, so it doesn't bother you.'" (Tr. 360).

The government seeks to draw some sort of inference of guilt on Rizzi's part from this testimony. Notably, Kamen never indicated that he drew some inference of illegality from the size of the check. Clearly, he was merely impressed by the size of the check and, perhaps, envious of the fact that the largest part went to Sacolick. In fact, he subsequently admitted that he would look at the face side of subsequent checks (Tr. 453).

That Rizzi, in behalf of Sacolick, presented such checks to Kamen (or to any other physician, for that matter), is of no significance unless Rizzi in fact had guilty knowledge of the alleged double billing practices. It makes no sense whatsoever to draw an inference of guilty knowledge from the mere presentation of a check, for signature. The evidence revealed nothing more.

H. The Health Department Seminars.

Al Schwartz, a former Assistant Commissioner of Health of the City of New York, testified that, during April and May of 1974, the Health Department ran a series of seminars with respect to the administration of methadone clinics (Tr. 658-9). The topics discussed at each of the seminars are set forth in the seminar circular, which was marked in evidence at the trial as Government Exhibit 64.

There is no evidence, either by virtue of the seminar topics, or by the testimony at trial, that any discussion was ever held concerning where primary medical care ends and specialized medical care begins. Rizzi attended one or two of those seminars (Tr. 596), but there is no evidence as to the subject matter of the seminar or seminars he attended. The seminars lasted an hour or two (Tr. 662), and it was not unusual for Medicaid methadone center operators to complain about the \$4.00 rate that they were paid (Tr. 651). The government's brief seems to argue that, to the extent that Rizzi may have heard such comments, this should have revealed to him that the doctors at the Sacolick clinic were engaging in improper billing practices. The argument is without merit. Either Rizzi knew that the clinic doctors were improperly billing for mandatory basic medical care, or he did not. Complaints by the Medicaid clinic operators as to the reimbursement rate would have shed no light for Rizzi on that critical question.

I. The Alleged Rushing Incident.

According to Kamen, on one or two occasions during the many months of his practice at the clinic, Rizzi asked him to expedite his examination of patients (Tr. 456). Patients saw physicians at the clinic at their own request. There could well be a line of patients waiting to see the physician (Tr. 468-9). That, on one or two occasions,

Rizzi sought to expedite Kamen's examinations, can hardly amount to evidence that he had thoughts of illicitly lining his own pockets by doing so. By his own admission, at trial, Kamen, unbeknownst to himself at the time, and throughout his tenure at the clinic, developed a malady which sapped him of his energy (Tr. 367). If Kamen, himself, did not, at the time, recognize the reason for his own lethargy, how could Rizzi have been expected to do so?

* * *

For all of the above reasons, the trial court should have granted the defense motions at the end of the prosecution's case and at the end of the evidence, since, as a matter of law, there was no basis for a jury to convict the defendant of the crimes charged. We respectfully urge that this lack of evidence requires a reversal of the conviction and a dismissal of the indictments.

POINT II

IT WAS PLAIN ERROR FOR THE COURT TO RECEIVE IN EVIDENCE THE NOTATIONS WHICH APPEAR ON GOVERNMENT EXHIBITS 430 and 43P SINCE THESE CLEARLY DID NOT FALL WITHIN THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

Rule 803(6) of the Federal Rules of Evidence provides:

"Records of Regularly Conducted Activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." [Emphasis added].

Government Exhibit 430 is a Sacolick, P.C., check to Rizzi's corporation, dated April 12, 1974. On the left hand stub of the check, the following handwriting appears: "Through 2/28/74, less \$1,057.50 reserve re: Kamen pending."

Government Exhibit 43P is a Sacolick, P.C., check to Rizzi's corporation, dated May 10, 1974, in the amount of \$1,057.50, on the left hand stub of which is written: "Balance on account through 2/28/74."

Both of the above noted checks were received in evidence as part of a large number of checks (Tr. 203).

The government sought to argue that these notations were: (1) written by Sacolick, (2) prior to the checks going to Rizzi, and (3) that they represented 30% of a particular Medicaid payment that had been made with respect to Kamen's specialized service bills. (See: G.B., at p. 16, fn.).

Since this is the only instance in which the government claims that Rizzi ever received any portion of a specialized services check, it is ultimately, this slender

reed upon which the government relies as evidence of Rizzi's profiting from the alleged double billing.

As noted by the District Court, "There is no evidence as to whose handwriting it is on the check." (Tr. 787). Nevertheless, the Court found it to be, "A business record made contemporaneously and the jury can treat it, I think, as such." (Tr. 788).

In fact, none of the essential elements of the business records exception is present in this case. It was not established who made the notation, when the notation was made, who the custodian of the record was, nor whether, based upon the testimony of the custodian, the checks remained in the same condition as they had been at the time they were drawn.

Counsel's efforts to limit the jury's treatment of the checks was unsuccessful (Tr. 787), and no objection was specifically made with respect to the failure of the checks to meet the business records requirement. We urge, particularly under the facts of this case, that the admissibility of the checks, and the failure of the Court to give a limiting instruction with respect to the consideration of the statements on the checks, was plain error, and requires a reversal of the conviction.

POINT III

IT WAS PLAIN ERROR AND VIOLATIVE OF
THE DEFENDANT'S RIGHT TO CONFRONT
AND CROSS-EXAMINE THE WITNESSES
AGAINST HIM, FOR THE COURT TO ASSURE
THE JURY OF THE EXISTENCE OF FACTS
NOT RECEIVED IN EVIDENCE.

Dr. Zane, a certified pathologist, testified
as to the specialized nature of the pap smear and gonorrhea
tests which he administered to clinic patients.

During the course of his testimony, the following
colloquy occurred between the Court and Dr. Zane, in the
presence of the jury:

"THE COURT: While you are looking for
that, let me ask, Doctor, is it not a fact
that tests such as pap smears and gonorrhea
tests can be done by licensed clinics that
are not owned or operated by medical doctors?

"THE WITNESS: A thing a doctor like me,
with my specifics, could do it in my office.

"THE COURT: I am aware that doctors can
do them in their own office, but beside that,
there are testing laboratories to which doc-
tors send their tests which are operated by
non-doctors, are there not?

"THE WITNESS: That's true.

"THE COURT: And these facilities are
licensed by the State of New York?

"THE WITNESS: They are technicians,
laboratory technicians. While they work
without being doctor, they are supervised
at all times by licensed and board certified
pathologists.

"THE COURT: That is true under the
current law. But there are a number of
facilities which under the grandfather
clause are allowed to operate without a
doctor being in charge.

"THE WITNESS: I heard about this in other states. I am not sure this is valid in New York State. I heard about this.

"THE COURT: I assure you it is, because I had the case involving it. It was tried in front of me." (Tr. 318-19).

As innocent as the Court's intentions may have been, the effect of the aforesaid colloquy was that the Court gave evidence before the jury, and that evidence tended to denigrate the claim that Zane's services had been of a specialized nature. Since the difference between basic and specialized services was critical to the evidence in this case, the Court's comments constituted an impermissible violation of the defendant's right to confront and cross-examine the witnesses against him. For that reason, the judgment of conviction should be reversed.

Conclusion

For all of the above reasons, the conviction should be reversed and the indictment should be dismissed; in the alternative, the defendant should be granted a new trial.

Respectfully submitted,

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MAR 20 1978

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